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On reargument the Government is likely to again urge that all it has to do to meet the standards of exemption 7 is to put in an affidavit claiming that the documents are part of an investigatory file for law enforcement purposes. There are several arguments against this position:

1. This position allows the government to prevail in all cases simply by submitting perjurious affidavits. Carried out ridiculo ad absurdum it allows the Justice Department to suppress documents which are a matter of public record on the grounds that they are part of an investigatory file, as in fact the Justice Department did when Weisberg sought the London Extradition Documents. Numerous instances of Justice Department perjury have recently come to light. Indeed, the affidavits submitted in connection with these Freedom of Information lawsuits are perjurious or at the very least, highly deceptive.

2. The Government's position denies the de novo review specified in the Freedom of Information Act. This emasculates the Court, giving it no more power than the hapless citizen who requested the documents.

3. The Government position misinterprets the legislative history by asserting that in noting that its purpose was to protect "sensitive files, such as FBI files" the House Report declares a total exemption for all FBI files. If this interpretation were correct, it would either eliminate the files of all other agencies performing investigative functions from the purview of the exemption or else it would require the investigative files of all other agencies to be accorded the same treatment as the FBI files are supposed to be given.

4. The language of the statutes requires that there must be a concrete prospect of law enforcement. Since the court must interpret and judge whether or not such a concrete purpose does in fact exist (See Bristol Meyers), it is clear the court can go behind the text of the affidavit submitted by the Government.

5. The fact that the language of the statute requires concrete prospect of law enforcement action to be demonstrated indicates that the Congress was looking to the harm to be done by releasing Government investigatory files and that only by citing a harm can the Government meet its burden of justifying suppression.

6. As the Government interprets the statute, all FBI files are closed for all time to the public.